84-1774

Office-Supreme Court, U.S.
FILED
MAY 10 1985
ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALVIN E. EWERT,

Petitioner,

vs.

EXXON COMPANY, USA, a Division of
EXXON CORPORATION, a Delaware corporation,
and RAYMOND TURVIELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether in an action under the *Federal Petroleum Marketing Practices Act* (15 U.S.C., *Section* 2801-2806) (the "PMPA") a franchisee-dealer can invoke fraud by the franchisor in inducing renewal of the franchise relationship to prevent termination of his agreements for the service station on a basis inconsistent with the representations made by the franchisor?

2. Whether claims that a franchisor terminated a franchise relationship for discriminatory, retaliatory or punitive reasons can be raised to overcome the franchisor's business judgment defense in a franchisee-dealer's action for violation of *PMPA*?

3. Whether lack of notice under *PMPA* to the franchisee-dealer of intended action prior to relinquishing options to extend the term of the ground lease for a service station (thereby cutting short the franchisee-dealer's expected 10 year tenure) prevents the franchisor from raising the business judgment defense in the franchisee-dealer's action for violation of the *PMPA*?

4. Whether the preemption Section of the *PMPA* (15 *U.S.C., Section* 2806(a)) precludes maintenance by a franchisee-dealer of State claims for unfair competition, fraud and misrepresentation which are not directly related to termination or non-renewal of the franchise?

5. Whether an agreement, executed as part of a short-term renewal of Dealer Agreements by a franchisee-dealer of a service station, operated as a matter of law to waive claims then being litigated in this lawsuit for fraud and retaliatory and discriminatory termination of his franchise?

LIST OF PARTIES

ALVIN E. EWERT ("EWERT"), the petitioner here is married to BETTY EWERT. She has a community property interest in the outcome of this litigation. There are no others with such interests.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPORTS OF OPINIONS

The Opinion and Order by the United States District Court for the Northern District of California, the Honorable ROBERT P. AGUILAR (the "Trial Judge"), dated August 24, 1983, awarding Summary Judgment to EXXON COMPANY, USA, a Division of EXXON CORPORATION ("EXXON") and RAYMOND TURVIELL ("TURVIELL") (EXXON and TURVIELL collectively the "respondents") is set forth as the Appendix, pages A1 to A8. The Memorandum of Decision of the Court of Appeals for the Ninth Circuit (the "Ninth

Circuit"), dated February 12, 1985, affirming the Judgment below, determined, among other things, that: (a) EWERT's claims of violation of the *PMPA* provisions by EXXON's attempted early termination of his dealer agreements are not maintainable because this was rescinded and he was permitted to remain for the full 3 year term of his lease; (b) EWERT's claims under *PMPA* that EXXON's basis for nonrenewal was a pretext to mask its retaliatory and discriminatory motives were waived as a matter of law by language in the Addendum executed by EWERT for a four and one-half (4½) month extension of the term of his dealer agreements; and (c) EWERT's State Law claims for unfair competition, and misrepresentation and concealment were preempted by the *PMPA*. The full text of this Memorandum of Decision is set forth in Appendix, pages A9 to A12.

JURISDICTION

The Ninth Circuit Memorandum Decision was entered February 12, 1985. Jurisdiction of this Court is invoked pursuant to 28 *U.S.C., Section* 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation of the *PMPA*, which prohibits a franchisor from terminating a franchise prior to the conclusion of the term stated in the franchise agreements or from failing to renew any franchise agreement unless such acts are specifically authorized by exceptions set forth in the *Act*. The specific exception relied upon by respondents to justify termination and/or non-renewal here is set forth in the following Sections:

(i) 15 *U.S.C., Section* 2802(b)(2)(C):

> (C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the

period the franchise is in effect and the franchisor first acquired actual constructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to *Section* 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to *Section* 2804(b)(1) of this title.

(ii) Such event includes 15 *U.S.C., Section* 2802(c)(4):

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal).

(iii) 15 *U.S.C., Section* 2804(a):

(a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship—. . .

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(iv) 15 *U.S.C., Section* 2804(b):

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect.

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable. . . .

BASIS FOR FEDERAL JURISDICTION

EWERT's claims here arise under the *PMPA*. The District Court had jurisdiction of these claims under 15 *U.S.C., Section* 2805(a). The Court had pendent jurisdiction for his State claims under *Article* III, *Section* 2 of the *United States Consitution.*

STATEMENT OF THE CASE

For some twenty (20) years EWERT operated branded service stations franchised by EXXON and its predecessors in interest. EWERT was the franchisee-dealer at the service station at 1387 Treat Boulevard, Pleasant Hill, California (the "service station") from February 26, 1966 (when it opened) until March 31, 1983 (when EXXON closed it down). EXXON did not own the ground for the service station but leased it under a written lease (the "Ground Lease") from the landowners (the "ground lessors"). The Ground Lease had a basic fifteen (15) year term (expiring February 28, 1981) and EXXON had two (2) five (5) year options to extend the term, which were automatically exercised unless EXXON affirmatively cancelled one or both.

From the time the service station opened EXXON entered into a series of dealer leases with EWERT for its operation by the latter as franchisee. On October 16, 1979, EXXON presented to EWERT a three (3) year lease for the service station (the "1979 Dealer Lease"). At that time TURVIELL, the EXXON Field Representative for the service station, discussed the Ground Lease with EWERT. EWERT was aware that the fifteen (15) year term of the Ground Lease would expire sometime during the three (3) year term of the 1979

Dealer Lease but didn't know exactly when. He was also aware that EXXON had two (2) five (5) year options to extend the term of the Gound Lease. EWERT asked TURVIELL if EXXON were to decide not to exercise the options for extension of the term of the Ground Lease whether EWERT would be allowed to take over the Ground Lease and continue to operate the service station for the remaining ten years of the options. TURVIELL told EWERT. "yes. I suppose so . . . I don't see any reason why you shouldn't be able to take over the lease". EWERT understood from this that he'd be given the opportunity to take over the Ground Lease were EXXON to decide not to extend the term under its options.

The 1979 Dealer Lease was on a form which, significantly, did *not* have the "underlying estates paragraph" (paragraph 4 of the Dealer Lease) filled in with the date for expiration of the Ground Lease. Had this been filled in it would have provided notice to EWERT that the Ground Lease might expire prior to the November 15, 1982, date provided for in the 1979 Dealer Lease. EWERT was aware that it was common industry practice at that time for the franchisor to fill in the expiration dates in such clause wherever the basic term of the Ground Lease was going to expire during the term of a new dealer lease. But, failure to fill in the details called for in that paragraph was consistent with the conversation EWERT had with TURVIELL, since either way it worked out (whether EXXON opted to extend the Ground Lease or elected to turn it over to EWERT) the paragraph had no real effect. He was also aware that renewal of his franchise would be automatic so long as EXXON had tenure at the location unless he violated some substantial provision of his agreements. This coincided with his then plans to retain the station until he retired in the early 1990's. Based on these considerations EWERT entered into the 1979 Dealer Lease on November 15, 1979.

EXXON's monthly rental on the Ground Lease was $500 per month (plus approximately $125 per month in real property taxes) and the same rental applied during the option periods. Thus, at the time it entered into the 1979 Dealer Lease EXXON had more than ten (10) years under the Ground Lease and

options without any change in monthly rental amount. EXXON's rental charges to EWERT under the 1979 Dealer Lease, however, were $894 a month. This was subject to further increase at EXXON's election in accordance with a formula provided for in the 1979 Dealer Lease.

On December 14, 1979, after EWERT was fully committed to the 1979 Dealer Lease, EXXON claims to have written EWERT to advise him that paragraph 4 of the 1979 Dealer Lease should have been filled in with March 23, 1981, the supposed then expiration date of the Ground Lease. EWERT denies he ever received such notice. EXXON did, however, write EWERT on May 5, 1980, to advise that the date for expiration of the Ground Lease was in error and that the "correct date" was February 28, 1981. EWERT received this last letter on June 19, 1980.

On July 8, 1980, barely a month after giving the notice of the "correct" date, EXXON's local management recommended that the options on the Ground Lease be dropped. Under the terms of the Ground Lease, EXXON could drop these at the expiration of the 15 year base period of the lease by giving the ground lessors notice of such termination not less than 90 days in advance of the expiration date. Thus, EXXON could have given the required notice to the ground lessors at any time on or before the end of November, 1980, and have been timely. Nonetheless, on July 18, 1980, EXXON notified the ground lessors of its election to drop the options and to let the Ground Lease expire on February 18, 1981. This decision was ratified by EXXON's management on July 21, 1980. But, it wasn't until the end of July or the first part of August, 1980, that EWERT first heard from TURVIELL about EXXON considering terminating the Ground Lease. From what he was told it wasn't clear to EWERT whether this was firm or just something in the works. EWERT obtained the name and address of the ground lessors and sought to negotiate a ground lease with them in his own name. However, he was told that the property was on the market for $225,000 and that the ground lessors might consider leasing it to him for only 2 years at a rental of $2,000 per month.

In early September, 1980, Short Valve Company in Oakland, California, offered EWERT a job as a foreman, at a salary of $2,300 per month. Discouraged by his conversations with the ground lessors and EXXON's apparent decision on the options, EWERT talked to TURVIELL about getting out of the station. TURVIELL however, told EWERT he was obliged to stay until February 28, 1981, when the 1979 Dealer Lease expired and that he'd be subjected to penalties if he didn't do so. He, of course, lost the job opportunity with Short Valve.

On November 3, 1980, EXXON finally got around to formally advising EWERT that ". . . the underlying lease on the service station expires on February 28, 1981, and will not be extended or renewed and that (he'd) have to give up possession of the station on that date". On November 7, 1980, EWERT, uncertain then about the actual status of the Ground Lease, because the notice appeared to be of an event not yet accomplished, wrote EXXON asking for an assignment of the company's rights in the Ground Lease, including the options, and offered to purchase the facilities there for $29,000. On November 20, 1980, EXXON finally advised that the options on the Ground Lease were "lost". On December 15, 1980, EWERT wrote asking for details on how the options were "lost", and advised that if the options were indeed relinquished he'd look to EXXON for compensation. For the balance of that month EXXON continued to insist that EWERT be out at the end of February, 1981. But, on January 13, 1981, EXXON obtained an extension on the Ground Lease, through March 31, 1983. EXXON then advised that EWERT's 1979 Dealer Lease would not terminate on February 28, 1981, after all. EWERT stayed on under the 1979 Dealer Lease until November 14, 1982.

On October 29, 1981, EWERT filed the instant action in the Superior Court of California, County of Contra Costa. This alleged, among other things, tortious breach of the covenants of good faith and fair dealing and of quiet possession, interference with economic advantage, unfair and fraudulent business practices in violation of *California Business and Professions Code, Section* 17203 and fraud and misrepresentation. The complaint

sought injunctive relief, compensatory and punitive damages. On December 30, 1981, EXXON removed the case to District Court. The Trial Judge required the Complaint to be recast under the *PMPA* and plaintiff did so.

On November 15, 1982, EXXON entered into a new dealer lease (the "1982 Dealer Lease") with EWERT for the 4-½ month period ending March 31, 1983. The normal Paragraph 4 (underlying estates clause) was deleted entirely and the following rider was attached to it:

> "Section 4 (Underlying Estates) hereinabove is deleted in full and the following is substituted therefor:
>
> 4. UNDERLYING ESTATES: Lessee has been notified in writing prior to the commencement of the term of this lease:
>
> (a) that EXXON is not the owner of the premises herein leased but holds the premises under a lease which expires on March 31, 1983, and
>
> (b) that such underlying lease will expire and not be renewed or extended beyond its expiration date, which is also the end of this lease term. It is understood and agreed that this lease and the estate created hereby are subject to all of the terms, provisions and conditions of such underlying lease and that if such underlying lease (or any extension or renewal thereof) expires or is terminated for any reason prior to the end of the term of this lease and is not extended or renewed, then, and in that event, this lease shall terminate (without any liability on the part of EXXON) upon the date such underlying lease (or any extension or renewal thereof) expires or is terminated. EXXON shall be under no obligation to seek an extension or renewal of such underlying lease or to exercise any extension or renewal rights EXXON has or may have under such underlying lease. To the extent reasonably necessary to determine EXXON's rental obligation under such underlying lease, Lessee agrees to permit EXXON to inspect Lessee's business records."

On March 31, 1983, EXXON required EWERT to vacate the service station. EXXON's representative inventoried the gasoline at the service station and the accessories and parts and identified the tools they intended to purchase from him. The total value of the items involved with offsets amounted to some $8,000. EXXON pulled the tanks and pumps, took his keys and excluded EWERT from the service station facilities.

Thereafter, EWERT negotiated an interim occupancy agreement with the owners of the property affording him essentially month-to-month tenure until they could obtain permits for development of the property. He continues to do car maintenance and repair work there but is unable to sell gasoline or fuel.

EWERT, over a long period of time, vigorously and vocally opposed EXXON's policies and practices with respect to retail prices charged by franchisee-dealers for gasoline. He did so, through membership in the Dealer's Association, and on panels and by voicing his opinion at EXXON's dealer meetings. He claimed these policies and practices were designed to set prices at artificially low levels and constituted unfair and illegal attempts to set dealer prices. Equally, in the 1979-81 period EWERT and other dealers in the area were being subjected to intense pressure by EXXON representatives to lower their prices (even to a zero margin) to be competitive. When the options on the Ground Lease were relinquished, EXXON stopped pressuring EWERT on his gasoline prices. These facts and the related economic circumstances support the claim that EXXON's decision to terminate the ground lease on this prime service station location (adjacent to the Pleasant Hill Station of the Bay Area Rapid Transit District, an area heavily traveled by commuters who drive to the station and park in that neighborhood) was in retaliation for his opposition and was to serve as a lesson to others who might be similarly inclined. As such, EWERT contends EXXON's actions were malicious and anti-competitive and were, thus, violative of the *PMPA*. Equally, the misrepresentations by TURVIELL as to his being afforded the opportunity to take over the Ground Lease options

himself should, in equity, prevent EXXON from pursuing rights that it might otherwise have had under that *Act* to eliminate this service station.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit decision leaves open the significant question under *PMPA* of whether renewal of a franchise relationship which was induced by fraud of the franchisor can be invoked to prevent termination of that franchise by the franchisor on a basis which is inconsistent with the misrepresentations made, and Certiorari is necessary to now resolve this important question of law.

Clarification of *PMPA* is a matter of national concern. Thousands of independent service station operators look to the *PMPA* for protection of their small businesses. And, they do need that protection. According to industry sources some 7,000 service stations in California alone have been closed down since 1972. Over 1,000 here have closed in the last year. Yet, California has the largest population in the Nation, and this is growing. There are more cars on the road every year. Despite these facts, once closed, the involved stations are generally not being replaced. The same pattern affects the service station industry nationally. This is indeed a significant Federal concern.

Moreover, it is repugnent to generally accepted principles of contract law that a party, inducing another to enter into a contract by fraud, should be permitted to avoid the obligations expressed by those misrepresentations. This is particularly the case where the parties enjoy a confidential relationship. The franchisor-franchisee relationship is certainly in that category. Under the general law the injured party in such circumstances has the election of whether to proceed in contract or in tort against the wrongdoer. *Witkin, Summary of California Law (8th Edition), Contracts, Section* 314, page 264. Current case law is unclear as to the applicability of this general principle in *PMPA* situations. This Court should act to establish the principle that fraud precludes termination of the franchisor-franchisee relationship under that *Act*.

There is presently little case law on this issue. *Wojciechowski v. Amoco Oil Co.* (D.C.E.D. Wis., 1980), 483 F.Supp. 109 is a direct holding in the case of a "trial franchise" under *PMPA*. There, the franchisor represented to the franchisee on a "trial franchise" that the law required him to be treated as a "trial franchisee" (a misrepresentation of law) and that the franchise would be renewed at the end of the trial period if his performance was adequate (a misrepresentation of fact). The Court held that the franchisor's actionable representations were sufficient acts of fraud to deprive the franchisee of the benefits of the "trial franchise" provisions of the *PMPA* and afforded a basis for injunction against termination of the franchise with the dealer involved.

Support for a similar conclusion of the context of the usual 3 year franchise relationship is contained in *Gaspar v. Chevron Oil Co.* (D.C.N.J., 1980), 490 F.Supp. 971. There, the franchisor sought Summary Judgment in an action by a former franchisee-dealer to recover some $12,000 paid by the latter to retain the lease on his service station when the franchisor Oil Company let lapse its option to renew the term of its ground lease without notice to the former franchisee. The Court granted Summary Judgment and denied relief to the former franchisee when he admitted he had no knowledge of the existence of the renewal option of the ground lease, stating as follows (490 F.Supp. 971, at p. 974):

> "If plaintiff had known about the option at the time he entered into the Franchise Agreement, he might argue that he relied upon the existence of possible exercise of said option to justify contemplation of a like extension of his Franchise Agreement. Without such knowledge, no such justification exists."

Here, EWERT knew that the 15 year term of the Ground Lease would end sometime during the term of the 1979 Dealer Lease. Prior to executing it, TURVIELL indicated that he'd be permitted to take over the options if EXXON were to decide to drop the service station. EWERT was aware at the time that others had been offered that same opportunity, he himself having been offered a station in Reno, Nevada, on that basis.

He was also aware that the 1979 Dealer Lease did not have filled in the "underlying estates clause" (which is paragraph 4) with the expiration date of the Ground Lease which by terms of the 1979 Dealer Lease made the provision inoperative. From these EWERT understood that he would have firm tenure and with that in mind intended to retain the service station until his retirement in the early 1990's. Under the circumstances, permitting EXXON to drop the Ground Lease options as they did at the end of July, 1980, with impunity, would sanction fraud and would violate the intent of the *PMPA*.

EXXON should also be considered estopped from raising the defense that the Ground Lease was terminated and, therefore, that its acts in terminating or nonrenewing EWERT's franchise relationship in March, 1983 were justified. The case law under *PMPA* specifically recognizes estoppel as a basis for defeating the franchisor's attempt to terminate a franchise. *DiNapoli v. Exxon Corporation* (D.N.J., 1982), 549 F.Supp. 449. California law, similarly recognizes this concept. Thus, *California Evidence Code, Section* 623 provides that whenever a party has, by his statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act on such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it. Actual fraudulent intent is not necessary to raise an estoppel, if the circumstances are such that a fraud would be perpetrated by permitting a denial of the representations. *Lix v. Edwards,* 82 C.A.3d 573, 147 C.R. 294 (1978).

All the necessary elements of estoppel are present here. TURVIELL's statements gave EWERT to understand that he'd be allowed to take over the options to renew the Ground Lease were EXXON to decide not to exercise them. TURVIELL's statements were made with knowledge, actual or virtual, that this was not a sure thing. EWERT certainly knew nothing about any supposed internal policy of EXXON to the contrary and, in fact, had the impression that an assumption by him of EXXON's option rights was permissible. TURVIELL's statements were made at the time when renewal of the 1979 Dealer Lease was being discussed. And, a fair inference is that they

were made with the purpose in mind of inducing EWERT to act on them and he did so execute the 1979 Dealer Lease. There is, therefore, a clear foundation for invoking estoppel, which should be considered as a basis for defeating EXXON's claim that it acted properly under *PMPA*.

2. The Ninth Circuit Decision also sidesteps whether claims that the franchisor terminated the franchise relationship for discriminatory, retaliatory or punitive reasons can be raised to overcome the franchisor's business judgment defenses action under *PMPA*, and Certiorari is needed to resolve this significant Federal question.

With the broad interpretation of the preemption provisions of the *PMPA* by some Circuits (as negativing all common law and State claims), without provision for relief where termination or non-renewal are for wrongful reasons, the franchisee-dealers will be substantially without recourse in many cases of serious franchisor misconduct. The latter would include situations where the franchisor acts for reasons which are plainly contrary to public policy, such as fixing prices, enforcing illegal tying agreements and the like. This Court should act to establish the rule that franchisors may not, with impunity, terminate or nonrenew franchises under *PMPA* for such wrongful reasons.

The Congress in enacting the *PMPA* sought to balance the conflicting interests of the franchisor and franchisee-dealer, in cases where the former has an option to extend its ground lease and elects not to exercise it for business reasons. In construing the relevant provisions of the *Act* the Courts have concluded that the franchisor may not be compelled to extend the term of its ground lease with the landlord, if, in the franchisor's good faith business judgment, such renewal was not in its best interests. *Gaspar vs. Chevron Oil Co.* (D.C.N.J., 1980), 490 F.Supp. 971; *Bernardini vs. Exxon Corp.* (D.C.E.D.Pa., 1981), *CCH 1981-1 Trade Cases,* para. 63,921; *Sachi vs. Mobil Oil Co.* (E.D.N.Y., 1979), *CCH 1980-81 Trade Cases,* para 63,044; *Veracka vs. Shell Oil Co.* (C.A.1st., 1981), 655 F.2d. 445.

There is, however, a conflict among the Circuits as to whether the claim of good faith business judgment is subject to

judicial scrutiny at all. The Trial Court in this case, in support of its holding that the issue of EXXON's good faith business judgment was not open to judicial scrutiny, cited *Bsales vs. Texaco, Inc.* (D.N.J., 1981), 516 F.Supp. 655; *Gaspar vs. Chevron Oil Co.*, supra; and *Kajdan vs. Exxon* (D. Conn., 1980), *CCH 1980-1 Trade Cases*, para. 63.362. These cases do not support this sweeping conclusion. Other case law indicates that the good faith business judgment defense can be overcome by proof of the franchisor's motivation as discriminatory, retaliatory or punitive. *Gilderhus vs. Amoco Oil Co.*, (D.Minn., 1980) *CCH 1980-81 Trade Cases*, para. 63,649; *Marini vs. Atlantic Richfield Co.* (D.C.N.J., 1979) 475 F. Supp. 142; *Sexe vs. Husky Oil Co.* (D.Mont., 1979), 475 F. Supp. 135; *Thompson vs. Kerr-McGee Refining Corp.* (C.A. 10th, 1981) 660 F.2d 1380; *Tiller vs. Amerada Hess* D.S.C., 1981), 540 F.Supp. 160. The Courts have permitted proof of subjective intent by inference from the objective facts and evidence. See *Tiller vs. Amerada Hess Corp., supra; Munno vs. Amoco Oil Co.* (D.C.D. Conn., 1980), 488 F.Supp. 1114.

In this case there is ample and circumstantial evidence of improper motivation by EXXON in terminating EWERT's franchise relation. For over 20 year EWERT was an EXXON branded dealer and for over 15 years he was the franchisee-dealer at the service station here in question. He was, during said period, active in dealer affairs both as a member of EXXON's Dealer Council and through C.S.S.A., the California Service Station Dealers' Association. In these various activities, he consistently argued for a fair margin for dealers on gasoline. Events here suggest that he was eliminated as a member of EXXON's Dealer Council because of espousal of these particular views. Up until mid1980 he, along with other EXXON dealers in the area, were under heavy pressure by their representatives to drop gasoline prices and, by that device, increase their volumes. He resisted these pressures, both as violative of his "fair margin" principle and as an effort by EXXON to fix his prices, which he considered to be illegal. Equally, it is clear that the the only sure way to eliminate as an opponent to EXXON's pricing and related demands was to drop him as an EXXON dealer. That meant dropping the

options on this service station. The clear inference is that they did just that. This inference is supported by the fact that, after the decision to drop the options on the Ground Lease, EXXON stopped entirely pressuring him on prices. And, the economics would not appear to justify a business decision to terminate this Ground Lease at all. On the face of it, termination of the franchise meant that EXXON would have to write off some $29,000, which was the unamortized value of their facilities at the time of termination. This writeoff could have been avoided were they to have sold the facilities to EWERT as he requested. Equally, made some $270/month on the difference in rental between what they had to pay the lessor of the Ground Lease ($625/month) and what EWERT paid them ($894/month) under the 1979 Dealer Lease. The 1982 Dealer Lease had a higher rental ($989/month), and as a result, EXXON's return was even greater. Further, EWERT's gasoline sales at the station averaged 23,000 gallons a month. EXXON was making some profit on the sale of gasoline and on sales of allied products (oil, tires, batteries, etc.) to EWERT. The evidence, further, reflects that an attempt was made to conceal from EWERT the fact that the Ground Lease was going to be terminated. Despite TURVIELL's assurances about EWERT's being permitted to take over the options and extend the Ground Lease if EXXON were to decide not to exercise the options on the same, EWERT himself received no notice of EXXON's considerations on releasing the options on the Ground Lease until long after they were gone. And EXXON's notice releasing the options was given four (4) months before it was contractually obligated under the Ground Lease to drop the same. There are also questions as to whether EXXON followed its own procedures in evaluating the merits of the decision to terminate the Ground Lease. This service station, being located, as it is, adjacent to the Pleasant Hill BART Station and its extensive parking lot, is an unusual site. EXXON representatives testified they didn't even consider this aspect in preparing their recommendation to drop the options. Nor were the prolonged periods of street closings adjacent to the service station and the changes in the configuration of the interchange dealt with by local EXXON management in calculating the

corrected average monthly gallonage for the unit, the latter being the crucial consideration in determining whether the service station would be retained. These circumstances, together, create a reasonable inference that respondents, in releasing the options on the Ground Lease, were motivated by discriminatory, retaliatory and punitive reasons. As such there is an issue of fact for decision by a jury.

3. The Decisions below ignore the *PMPA* requirement that notice be afforded a franchisee-dealer before actions are taken which affect his tenure, resulting in a deprivation of due process, and Certiorari is needed to exercise this Court's supervisory responsibility.

Evenhanded application of the laws is a matter of constitutional concern. The *PMPA* sets up elaborate procedures for giving notice of actions affecting the franchise before such are final. Where these notice provisions are ignored, the statutory scheme of Congress is frustrated and substantial inequities result. Without prior notice of EXXON's intention to drop the options on the Ground Lease, EWERT was powerless to reverse the decision by application for injunctive relief under *PMPA*. He was thereby relegated to an action for damages, which is, at best, a poor substitute for the operating service station business he had built up over 15 years. Considerations of justice require that this Court reaffirm the Congressional mandate that notice was required in these circumstances and that the *PMPA* was violated here.

The *PMPA* requires notice to the franchisee-dealer prior to the commencement of the term of an existing franchise of the duration of the ground lease and of the fact that the underlying lease might expire and not be renewed during the term. 15 *U.S.C., Section* 2802(c)(4)(A) and (B). Equally, the occurrence of an event which takes place during the term of the franchise may be used as a basis by the franchisor, but to do so it must be one where the franchisor first acquired actual or constructive knowledge of such occurrence (a) not more than 120 days prior to the date on which notification of termination or nonrenewal is given (if notice is under Section 2804(a)) or (b) not more than 60 days prior to the date on which such

notice is given (if notice is under *Section* 2804(b)(1)). 15 *U.S.C., Section* 2802(b)(2)(C). *Section* 2804(a) requires 90 days written notice to the franchisee, and *Section* 2804(b)(1) allows less than 90 days notice in circumstances where it could not be reasonable to give that much so long as notice is provided ". . . on the earliest date on which furnishing of such notification is reasonably practicable . . .".

This is certainly no question here that EXXON was aware of its intention to relinquish the options on the Ground Lease in early July, 1980, more than 120 days before any notice was given to EWERT. In fact, the first notice of any kind to EWERT that there was going to be a problem with nonrenewal of the Ground Lease was after EXXON had relinquished its option rights. The first written notice to EWERT of what it had done with the options came on November 3, 1980, some 4 months after the option rights had been relinquished. On the face of it, defendants failed to provide notice to EWERT as required by the *Act.*

Where a franchisee-dealer has no standing to challenge the decision by the franchisor to refuse to relinquish the option to renew a ground lease, the requirement that notice be given of a decision to terminate has been overlooked. *Gaspar vs. Chevron Oil co., supra.* But, where the franchisee does have a basis for challenge of the decision not to execute the options, the notice provisions become critical. The structure of the *PMPA* suggests that Congress intended franchisees to be provided information sufficient to verify for themselves whether nonrenewals rest on grounds allowed by the *Act.* See *Sutton vs. Atlantic Richfield Co.* (D.C.C.D. Cal., 1982), 539 F.Supp. 658. The *Senate Report* on the *PMPA (Sen. Rep. No. 95-297, 95th Cong. Sess.,* reprinted in *(1978) U.S. Code Cong. & Ad. News,* 873 at p. 892) relates the following as to the purposes of these provisions:

> "The time limitations are designed to provide adequate opportunity for a franchisor to evaluate a potential grounds for franchise termination or nonrenewal prior to making a determination whether to terminate the franchise

or not to renew the franchise relationship. Flexibility is provided so that a franchisor may work with a franchisee in an effort to correct the situation and avoid termination of the franchise or nonrenewal in the franchise relationship."

Here, the franchisee-dealer had a basis for objection to the relinquishment of the options based on misrepresentations by respondents, and on EXXON's retaliatory, discriminatory and punitive motives. Notice was essential to permit EWERT to avail himself of injunctive and other equitable relief from the Court provided for in *Section* 2805(b)(1). None was provided, and, consequently, the actions by EXXON in relinquishing the Ground Lease cannot be relied upon by it as an event permitted termination of EWERT's dealer agreements.

4. The refusal below to permit EWERT to proceed on pendent State claims results in a deprivation of Constitutional guarantees of due process, and Certiorari is required to correct this manifest injustice.

The Congress provided for limited preemption under *PMPA* extending such only to conflicting state laws dealing with termination or nonrenewal of franchise relationships. There is confusion in the cases on the application of the preemption principle. To apply this principle to claims not within the categories specified in the *Act*, not only exceeds the Congressional authority but also results in deprivation of fundamental rights of the franchisee-dealer without due process. This Court should act to insure even application and equal protection of the laws.

The *PMPA* provides for preemption of state laws dealing with termination or nonrenewal of franchise relationships. 15 *U.S.C., Section* 2806(a). The legislators intended to leave to the Courts the task of sorting and how this would be applied. The *Senate Report* indicates this should be done by resorting to traditional concepts of equity to maximize attainment of competing statutory objectives consistent with the supremacy clause of the Constitution and the purposes of the Federal Legislation. *S. Rep. No. 95-731, 95th Cong. 2nd Sess. 42-43,* reprinted in *(1978), U.S. Code Cong. & Ad. News,* 873 at page 901.

There is a substantial conflict between the Circuits as to whether Congress intended to preempt all suits in the franchisee-dealer field by the *PMPA*. There are a number of cases which have considered pendent common law claims growing out of a franchise relationship separately and independently of the *PMPA* issues. *Bsales vs. Texaco, Inc.* (D.C.N.J., 1981), 516 F.Supp. 655 (pendant claims for fraud, misrepresentation, promissory estoppel, quasi-contract, tortious interference with prospective economic advantage); *Wojciechowski vs. Amoco Oil Co., supra.* (claims of promissory estoppel and price fixing in violation of the *Sherman Act.); T.A.M. Inc. vs. Gulf Oil Corporation,* (D.C.E.D.Pa., 553 F. Supp. 499 (claims of exclusive dealing and illegal tying agreements in violation *Section* 3 of the *Clayton Act* and and illegal tying agreements in violation of *Section 1 of the Sherman Act)*. The contrary position appears in *Huth vs. B. P. Oil, Inc., (D.Md.,* 1983), 555 F.Supp. 191 (claims for breach of contract and fraud held preempted); and *Meyer vs. Amerada Hess Corp.,* D.N.J., 1982) 541 F.Supp. 321 (claims for violation of *N. J. Franchise Practices Act* and to unstated common law counts held preempted).

EWERT's pendent claims are not directly connected with the termination or nonrenewal of his franchise. EWERT's claims for unfair competition arise under California Law which afford remedies of injunction to prevent unlawful, unfair or fraudulent practices and to restore any money or property which may be acquired by such means. *California Business and Professions Code, Section* 17203. Certainly, there is evidence that EXXON attempted to pressure EWERT to lower his retail gasoline prices over much of the period while he was dealer at this service station. These efforts ceased entirely in mid-1980. The same pressures which were applied to EWERT were employed with other EXXON dealers with whom EWERT competed. To the extent that these tactics resulted in reduced prices by the other EXXON dealers and, ultimately, in reduced sales to EWERT, such practices would constitute a basis for recovery, unrelated to the termination or nonrenewal of his franchise relationship and which would not necessarily be compensable under the *PMPA*. EWERT contends further that

the final act of unfair competition was defendants' act of shortening EWERT's tenure at the service station, constituting the ultimate punishment for his lack of cooperation on its gasoline pricing policies. This claim should not be preempted by the provisions of 15 *U.S.C. Section* 2806(a).

Additionally, EWERT's claims against TURVIELL for misrepresentation and those against EXXON for concealment and fraud are unrelated to the PMPA. The representations by TURVIELL as to EWERT's continued tenure at the service station once he executed the 1979 Dealer Agreements constituted misrepresentations of fact which are actionable as fraud under California Law. TURVIELL's acts, as agent of EXXON, are attributable to the latter. Moreover, given the impression created by TURVIELL with EWERT that he'd be entitled to take over the options under the Ground Lease should EXXON elect not to stay on the property (coupled with the notice of the actual date of termination of the Ground Lease on June 19, 1980, some six months after he entered into the 1979 Dealer Lease and barely a month before there was active consideration by the respondents to drop the options entirely) together with its total failure to communicate the latter, were themselves a form of concealment. These, together, constituted actionable fraud on the part of EXXON itself. If the decisions below are correct that the acts of the respondents in connection with the 1979 Dealer Lease are not cognizable under the ***PMPA,*** it is difficult to see how the principles of preemption would apply to prevent their being pursued under valid State claims that are maintainable. There is also a strong social policy against fraud, which should tip the scale in favor of a determination that preemption would not apply.

5. The Decision to affirm the Summary Judgment, based on waiver of EWERT's rights by executing documents for renewal of his franchise for a 4½ month period, departs from State Law, and this Court should exercise its power of supervision through Certiorari to correct this serious wrong.

The determination by the Ninth Circuit that the Addendum signed by EWERT as a part of the 1982 Lease constituted a waiver of his claims against EXXON for retaliatory and

discriminatory termination of his franchise is contrary to California law. What is required in California is a showing there was an intentional relinquishment by the waiving party of a known right. *Bettelheim v. Hagstrom Food Store,* 113 C.A.2d 873, 249 P.2d 301 (1952).

The Addendum does not purport by its terms to be a waiver of any rights by either party. What the language indicates it is, a statement of the legal effect of the renewal, (ie. that EXXON is not assuming additional liability by the renewal and that EWERT is not relinquishing any rights on account of it). There was no attempt by either side to dismiss the instant action, though it was pending when the Addendum was signed. Moreover, the parties did not argue, either in the Trial Court or in Ninth Circuit, that the Addendum constituted a waiver. The Trial Judge did not so find. The question of intent, in any event, makes this a jury question. Hence, the determination of the Ninth Circuit as to this issue cannot stand.

CONCLUSION

The Ninth Circuit Decision leaves open the question under *PMPA* of whether fraud of the franchisor in inducing renewal of a franchise relationship can be invoked by the franchisee to prevent termination of the franchise by the franchisor on a basis which is inconsistent with the misrepresentations made. It also sidesteps the further question under *PMPA* of whether a franchisor's termination of a franchise relationship for discriminatory, retalitory or punitive reasons bars it from raising business judgment defenses to franchisee-dealer's action under *PMPA*. Certiorari is required to resolve these significant Federal questions. Moreover, the decisions below ignore the *PMPA* requirement that notice be afforded a franchisee-dealer before actions are taken which affect his tenure, which oversight resulted in a deprivation of EWERT's rights to his livelihood without due process. Further, the refusal below to permit EWERT to proceed on pendent State claims only peripheral to the termination or nonrenewal of the franchise itself exceeds the

boundaries of the preemption section of the *PMPA* and deprives EWERT of property rights without due process. Certiorari is required to correct these manifest injustices. Finally, the Decision to Affirm the SummaryJudgments for respondents here, based on the concept of waiver by EWERT of his rights by signing the Addendum, departs from California Law, and this Court should exercise its power of supervision through Certiorari to correct this serious wrong

WHEREFORE, EWERT respectfully prays that a Writ of Certiorari issue.

DATED: May 6, 1985.

WILLIAM J. HOOY, *Attorney for Petitioner* ALVIN E. EWERT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALVIN E. EWERT,

Plaintiff,

vs.

EXXON COMPANY, USA, a Division of EXXON CORPORATION, a Delaware Corporation, et al.,

Defendants.

NO. C-81-4849 RPA

OPINION AND ORDER

The focus of this dispute is a service station at 1387 Treat Boulevard in Pleasant Hill, California. Plaintiff, Alvin Ewert, has operated an Exxon service station at this location since 1966. Ewert had the right to operate the service station pursuant to a series of franchise agreements with Exxon. Earlier this year Exxon attempted to terminate its franchise relationship with Ewert. Ewert filed the instant action challenging Exxon's right to terminate the franchise arrangement.

This case involves application of the Petroleum Marketing Practice Act ("PMPA") 15 U.S.C. §§ 2801, *et seq.* Specifically, the issue is whether defendant Exxon Corporation has the right to terminate its franchise agreement with plaintiff Alvin Ewert. This question is presented to the Court by way of Exxon's motion for summary judgment.

FACTS

Exxon leased the site of the service station from Dorothea Scholin under a ground lease. The terms of the ground lease were that the lease would run for 15 years. The 15 year term was to commence when a service station opened for business on the premises. The agreement between Exxon and Scholin also provided that in addition to the 15 year term Exxon would have

two options to extend the lease for five years. These options were established in such a manner that the ground lease would be automatically extended for five years unless Exxon gave Scholin prior notice of its intention not to exercise the options.

Ewert and Exxon entered a franchise agreement. Under the terms of the initial agreement between Ewert and Exxon, Ewert became the leasee and operator of the Exxon service station at 1387 Treat Boulevard. This arrangement commenced on February 28, 1966. The February 28 beginning of the arrangement between Ewert and Exxon also triggered the beginning of Exxon's 15 year ground lease with Scholin. Thus, the 15 year ground lease was slated to expire on February 28, 1981.

Ewert operated the service station under a series of short term agreements with Exxon. On October 9, 1979, Ewert entered into a new agreement. While the previous agreements had run for one year, the October 9, 1979 agreement was to run for three years, from November 15, 1979 to November 15, 1982.

Paragraph 4 of the three year agreement contained notice of the fact that Exxon did not own the site of the service station but held the premises under a lease. Paragraph 4 also notified the leasee (Ewert) that Exxon's lease for the site of the service station might expire and that Exxon might not renew or extend its lease of the premises.

The very first words of Paragraph 4 are: "This section 4 shall be inoperative unless the blanks herein have been completed." The blanks are provided for Exxon to fill in the month, day and year on which the underlying ground lease expires. On the lease agreement that commenced on November 15, 1979, Exxon failed to fill in the blanks in Paragraph 4.

Even though the blanks in Paragraph 4 were not filled in as required by the section itself, there is little question that Ewert knew Exxon had possession of the 1387 Treat Boulevard site by virtue of a 15 year lease, and that Exxon might not renew or extend the underlying ground lease. Ewert was also

aware that Exxon had two 5 year options on the premises. However, there is no evidence to suggest that when he signed the three year agreement Ewert had notice of the exact date that the 15 year ground lease would expire.

On December 14, 1979, a month after the three year agreement went into effect, Exxon sent Ewert a letter stating that the blanks in Paragraph 4 for the ground lease expiration date should have been filled in with March 23, 1981. Then in May 1980, Exxon notified Ewert that the correct date for expiration of the ground lease was actually February 28, 1981.

On July 18, 1980, Exxon notified Scholin, the landowner, that it did not want to exercise its option to extend the ground lease and that Exxon would allow the lease to expire on February 28, 1981.

In either late July or August 1980, Exxon sent a representative to inform Ewert that Exxon would not renew the ground lease. The Exxon representative told Ewert that if he wished to continue at the same location, he would have to negotiate a lease with Scholin directly. On November 3, 1980, Exxon wrote to Ewert giving him written notice of Exxon's intention that Ewert would have no right to the premises at 1387 Treat Boulevard after February 28, 1981, and the franchise agreement between the parties would be terminated as of that date. At this time, Exxon also sent Ewert the Department of Energy's written summary of the Petroleum Marketing Practice Act as required by 15 U.S.C. § 2804.

Ewert vehemently protested Exxon's termination on the ground that Paragraph 4 of the agreement was inoperative because of Exxon's failure to include the date that the ground lease would expire. Apparently recognizing the validity of Ewert's position, Exxon relented. They negotiated a 25 month extension of the ground lease with Scholin. Exxon then notified Ewert of the 25 month extension and rescinded its notice of termination of Ewert's franchise.

Under the agreements in existence, Exxon's ground lease with Scholin expired on March 31, 1983 and Ewert's lease with Exxon expired on November 15, 1982. To harmonize the dates, Exxon entered into a new agreement with Ewert. The new agreement gave Ewert a franchise from November 15, 1982 until March 31, 1983. Paragraph 4 was deleted completely from the contract and a rider was attached to the agreement. The rider said in full:

Section 4 (Underlying Estates) hereinabove is deleted in full and the following is substituted therefore:

4. UNDERLYING ESTATES: Lessee has been notified in writing prior to the commencement of the term of this lease:

(a) that Exxon is not the owner of the premises herein leased but holds the premises under a lease which expires on March 31, 1983, and

(b) that such underlying lease will expire and not be renewed or extended beyond its expiration date, which is also the end of this lease term. It is understood and agreed that this lease and the estate created hereby are subject to all of the terms, provisions and conditions of such underlying lease and that if such underlying lease (or any extension or renewal thereof) expires or is terminated for any reason prior to the end of the term of this lease and is not extended or renewed, then, and in that event, this lease shall terminate (without any liability on the part of Exxon) upon the date such underlying lease (or any extension or renewal thereof) expires or is terminated. Exxon shall be under no obligation to seek an extension or renewal of such underlying lease or to exercise any extension or renewal rights Exxon has or may have under such underlying lease. To the extent reasonably necessary to determine Exxon's rental obligation under such underlying lease, Lessee agrees to permit Exxon to inspect Lessee's business records.

On December 2, 1982, Exxon once again notified Ewert of the expiration date and the fact Exxon would not renew or extend that date. In the same letter, Exxon informed Ewert that "the Lease, Sales Agreement and Franchise relationship between you and Exxon will expire, terminate, and not be renewed effective 12:00 o'clock noon on Thursday, March 31, 1983." Once again, Exxon provided Ewert with a copy of the PMPA summary.

Ewert filed his complaint in the Superior Court for Contra Costa County on October 29, 1981. Ewert named as defendants Exxon Corporation, Raymond Turvill (an Exxon employee) and the Scholins (the owners) of the land at 1387 Treat Boulevard.

Defendants were served with the summons and complaint on various days in December 1981. Defendants removed this action to federal court on December 30, 1981. Removal was accomplished pursuant to 28 U.S.C. § 1441(b) (federal question jurisdiction) on the ground that Ewert's action arose under the PMPA. On March 12, 1982, this Court denied plaintiff's motion to remand the case to state court. By order of the Court, Dorothea Scholin was dismissed from the case on December 13, 1982.

At present, the Court has before it Exxon's motion for summary judgment with respect to all of Ewert's causes of action.

DISCUSSION

Exxon seeks to terminate its franchise agreement with Ewert under the PMPA, 15 U.S.C. 2802(c)(4), which provides that

> (c) As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—
>
> (4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—
>
> (A) of the duration of the underlying lease, and
>
> (B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

Thus, according to § 2802(c)(4), in order to terminate a franchise agreement based on the expiration of a ground lease, the requirements are that before the beginning of the franchise agreement the franchisee be notified in writing that the ground lease expires on a certain date and that the franchisor might not renew the ground lease.

The contract under consideration pursuant to Exxon's motion for summary judgment is the contract for November 15, 1982 to March 31, 1983. The parties entered into this agreement on June 29, 1982. The contract agreed to by the parties expressly addressed both the duration of the ground lease and Exxon's intentions with respect to the ground lease. The rider to the contract, which replaced Paragraph 4, contained written notification that the underlying lease for 1387 Treat Boulevard expired on March 31, 1983, and that Exxon did not intend to renew or extend the ground lease beyond that date.

Thus, with regard to the franchise agreement that ran from November 15, 1982 to March 31, 1983, Exxon complied strictly with the letter of § 2802(c)(4). Based on this determination, the Court finds that Ewert does not have a cause of action with respect to Exxon's termination of the franchise agreement with Ewert on March 31, 1983.

Many of Ewert's arguments against Exxon's motion for summary judgment appear to refer to Exxon's attempted termination of the franchise agreement that ran from November 15, 1979 to November 15, 1982. Exxon admits that it did not comply with the requirements of § 2802(c)(4) in trying to terminate this earlier franchise agreement. Recognizing this fact, Exxon withdrew its attempted termination and entered into a new franchise agreement with Ewert. However, Exxon's failure to comply with § 2802(c)(4) in connection with the November 15, 1979 to November 15, 1982 contract has absolutely no legal relevance to the legality of Exxon's subsequent actions. Thus, the Court finds Ewert's contentions to be meritless.

Ewert also seeks to demonstrate the existence of a triable issue of fact by questioning Exxon's motives. In essence, Ewert argues that Exxon did not exercise honest business judgment in deciding to terminate its agreement with Ewert, but that a wrongful motive guided Exxon's decision. Ewert contends that the question of Exxon's motivations raises a triable issue of material fact which precludes entry of summary judgment.

The Court finds that the case law makes it plain that under PMPA the validity of Exxon's business judgment is not open to judicial scrutiny. *Bsales v. Texaco, Inc.*, CCH Bus. Franchise Guide ¶7918 at 13,439 (D.N.J. 1980); *Gaspar v. Chevron Oil Co.*, 490 F. Supp. 971 (D.N.J. 1980); *Kajdan v. Exxon*, 1980-81 Trade Cases ¶63, 262 at 78,304 (D. Conn. 1980). Further, the Court finds no evidence that Exxon's decision to terminate its relationship with Ewert was based on any improper motive.

Accordingly, the Court determines that there is no triable issue of fact with respect to plaintiff's claims under the PMPA and the Court grants defendants' motion for summary judgment on these claims.

Plaintiff has conceded that his state law claims, claims 3, 4, and 5, are preempted by the PMPA. Accordingly, defendants' motion for summary judgment with respect to these claims is also granted.

Finally, the court finds that Ewert's sixth, seventh, and eighth claims are simply restatements of his claims about non-renewal under the PMPA. Thus, the Court awards defendants summary judgment on these claims as well.

IT IS SO ORDERED.

DATED: August 10, 1983

ROBERT P. AGUILAR
United States District Judge

Not For Publication

FILED
FEB 12, 1985
PHILLIP B. WINBERRY
Clerk, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALVIN E. EWERT,
Plaintiff-Appellant,

v.

EXXON COMPANY, USA, a division of EXXON CORPORATION; a Delaware corporation; RAYMOND TURVELL; DOES ONE THROUGH TEN,
Defendants-Appellees.

No. 83-2377

D.C. No. CV-81-4849-RPA

MEMORANDUM

Appeal from the United States District Court
For the Northern District of California
The Honorable R. P. Aguilar, Presiding
Argued and Submitted May 15, 1984

Before: WRIGHT, HUG, and NELSON, Circuit Judges.

The principal issue in this appeal is whether the non-renewal of the franchise relationship effective on March 31, 1983 violated the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2081-2841 (1982) (the "PMPA"). As the district court noted in its opinion granting the summary judgment, the contract in issue that constitutes the franchise, as defined in section 2801(2) of the PMPA, is the lease agreement executed by Exxon and Ewert on June 29, 1982 for the term commencing on November 15, 1982 through March 31, 1983.

Section 2802(b) of the PMPA provides that a franchisor, such as Exxon, may terminate a franchise or not renew a franchise relationship for a number of reasons, one of which is specified in section 2802(b)(2)(C):

> (C) The occurrence of *and event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable,* if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—
>
> (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or
>
> (ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(Emphasis added.)

Section 2802(c) contains a non-exclusive list of twelve events which constitute "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable," within subsection 2802(b)(2)(C). Exxon relies on section 2802(c)(4) as the basis for nonrenewal of its franchise agreement with Ewert which states:

> (4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—
>
> (A) of the duration of the underlying lease, and
>
> (B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal) . . . . .

The basic term of the underlying lease for the premises had expired on February 28, 1981 and a twenty-five-month extension through March 31, 1983 had been obtained. The addendum to the franchise agreement executed by the parties on June 29, 1982 for the term commencing on November 15, 1982 specified:

> 4. UNDERLYING ESTATES: Lessee has been notified in writing prior to the commencement of the term of this lease:
>
> (a) that Exxon is not the owner of the premises herein leased but holds the premises under a lease which expires on March 31, 1983, and
>
> (b) that such underlying lease will expire and not be renewed or extended beyond its expiration date, which is also the end of this lease term. It is understood and agreed that this lease and the estate created hereby are subject to all of the terms, provisions and conditions of such underlying lease and that if such underlying lease (or any extension or renewal thereof) expires or is terminated for any reason prior to the end of the term of this lease and is not extended or renewed, then, and in that event, this lease shall terminate (without any liability on the part of Exxon) upon the date such underlying lease (or any extension or renewal thereof) expires or is terminated. Exxon shall be under no obligation to seek an extension or renewal of such underlying lease or to exercise any extension or renewal rights Exxon has or may have under such underlying lease. To the extent reasonably necessary to determine Exxon's rental obligation under such underlying lease, Lessee agrees to permit Exxon to inspect Lessee's business records.

The franchise agreement addendum, signed separately by Ewert, provided notice that the term of the underlying lease would expire on March 31, 1983, and that the underlying lease would not be renewed or extended beyond its expiration date. The clear language of section 2802(c)(4) provides that the loss of the franchisor's right to grant possession of the premises

through the expiration of the underlying lease constitutes a reasonable basis for the nonrenewal provided that specific notice is given. The addendum, executed prior to the commencement of the term of the franchise agreement, clearly complies with the specific notice requirements of the statute.

Ewert's contention that the nonrenewal of the prior franchise agreement, which terminated on November 15, 1982, was in violation of the PMPA is not relevant to the termination of the franchise agreement here in issue, as the district court properly observed. The termination of the prior franchise agreement was rescinded. In the addendum to the franchise agreement of June 29, 1982, quoted above, Ewert specifically acknowledged that the underlying lease expired on March 31, 1983 and would not be renewed, and he further stated that his franchise agreement was subject to the terms of that underlying lease, and, thus, would also terminate on March 31, 1983. He agreed that Exxon was under no obligation to extend the underlying lease and that if the underlying lease was not extended or renewed, his lease, which constituted his franchise, would terminate without any liability on the part of Exxon. Ewert cannot now advance his arguments that the nonrenewal of the prior franchise agreement was in violation of PMPA because of defective notice, and that the basis for nonrenewal given by Exxon was a pretext to mask Exxon's retaliatory and discriminating motives. The franchise was renewed under the terms of the June 29, 1982 agreement, with both parties stipulating that it would terminate on March 31, 1983. Under these circumstances, the provisions of sections 2802(b)(2)(c) and 2802(c)(4) of the PMPA clearly provide permissible grounds for termination of the franchise relationship. *See Hifai v. Shell Oil Co.*, 704 F.2d 1425 (9th Cir. 1983).

Ewert's state law claims are essentially claims for damages for nonrenewal of the franchise relationship, and the district court was correct in ruling that they are preempted under the provisions of section 2806(a) of the PMPA.

AFFIRMED.*

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit, save as provided in Rule 21(c).

15 U.S.C., Section 2802(b)(1) and (b)(2)(c)

(b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if—

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or contructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

15 U.S.C., Section 2802(c)(4)

(c) As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying

lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

15 U.S.C., Section 2804(a)

(a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship—

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

15 U.S.C., Section 2804(b)(1)

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable;

15 U.S.C., Section 2805(a)

(a) if a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is

located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

15 U.S.C., Section 2805(b)(1)

(b)(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

15 U.S.C., Section 2806(a)

(a) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

28 U.S.C., Section 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

California Business and Professions Code, Section 17203

Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

***California Evidence Code, Section* 623**

Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

***Sen.Rep. No. 95-297, 95th Cong. Sess.* reprinted in *(1978) U.S. Code Cong. & Ad. News*, 873, *at page* 892**

The time limitations are designed to provide adequate opportunity for a franchisor to evaluate a potential grounds for franchise termination or nonrenewal prior to making a determination whether to terminate the franchise or not to renew the franchise relationship. Flexibility is provided so that a franchisor may work with a franchisee in an effort to correct the situation and avoid termination of the franchise or non-renewal of the franchise relationship.

Sen.Rep. No. 95-731, 95th Cong. 2nd Sess. 42-43, **reprinted in** *(1978) U.S. Code Cong. & Ad. News,* **873, at** *page* **901**

The preemption provisions of the legislation are limited to provisions of State law dealing with termination or nonrenewal of franchise relationships. The legislation is not intended to authorize or to prohibit franchise assignments; instead, as a general rule, assignability of franchises is a matter left to State law. However, there is an area in which Federal termination provisions under this legislation and State-granted rights of assignability of a franchise may conflict. It is intended that the harmonizing of these competing interests be left to judicial balancing of competing equities on a case-by-case basis. No hard and fast statutory rule would accomplish the desired goal of harmonizing the competing statutory objectives as equitably as application of general principles of equity to specific fact situations.